(54)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 864

F. F. DOLLERT, ET AL., *Petitioners,*

v.

PRATT-HEWIT OIL CORPORATION AND HOUSTON OIL COMPANY OF TEXAS, ET AL., *Respondents*

REPLY OF RESPONDENT, HOUSTON OIL COMPANY OF TEXAS,

To the Petition for Writ of Certiorari to the San Antonio Court of Civil Appeals of the State of Texas, and Brief in Support Thereof

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ALPHA LAW BRIEF CO., HOUSTON

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To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Respondent, Houston Oil Company of Texas, respectfully contends and submits that the Writ of Certiorari herein prayed for, wherein Petitioner seeks to have this Honorable Court review and reverse a decision of the Court of Civil Appeals, San Antonio, Texas, on the alleged ground that such decision denied to Petitioner (a) "due process of law" and (b) "the privileges and immunities" guaranteed by the 14th

Amendment of the CONSTITUTION OF THE UNITED STATES, should not be granted under the following facts, for the following reasons:

Summary Statement of Matters Involved

References hereinafter made are to Federal Transcript of Record (F.T.R.) filed in suit of Wert T. Reed, et al., v. Houston Oil Company of Texas, et al., No. 10,199, United States Fifth Circuit Court of Appeals, 132 Fed. (2d) 748, and filed in connection with Application for Writ of Certiorari, No. 877, October Term, 1942, in same suit in United States Supreme Court, 319 U.S. 743, 87 L. Ed. 1699, and to State Transcript of Record (S.T.R.), filed in connection with Application for Writ of Certiorari, No. 864, October Term, 1944, in suit of F. F. Dollert, et al., v. Pratt-Hewit Oil Corporation, et al., in United States Supreme Court.

Petitioner herein seeks to have this Honorable Court review and reverse a decision of the Court of Civil Appeals, San Antonio, Texas, rendered March 8, 1944, in the case of F. F. Dollert v. Pratt-Hewit Oil Corporation, et al. (179 S.W. (2d) 346), in which the Supreme Court of Texas, on May 31, 1944, entered an order determining that the judgment of the Court of Civil Appeals was correct and that the Petitioner's Application for Writ of Error should be refused for want of merit (S.T.R. pp. 39 and 48). The Court of Civil Appeals, by its decision, affirmed the judgment of the District Court of Refugio County, Texas, which was entered October 18, 1943, and which overruled F. F. Dollert's Motion filed August 5, 1943, to set aside an Order of Dismissal with prejudice entered at the request and agreement of all parties on January 26, 1937. Petitioner contended in his Motion, being a Motion for New Trial, that the judgment of dismissal was void on its face and that the contract of Septem-

ber 28, 1925, which plaintiff sought to set aside in the suit filed on September 28, 1927, was fraudulent and illegal. On the hearing of the Motion there was introduced no evidence of fraud or illegality in the contract. The Trial Court held that the judgment of dismissal was valid on its face and that the court was not really concerned about the contract itself but only about the previous order of dismissal and dismissed such Motion to set aside judgment and for New Trial for lack of jurisdiction, more than six years having elapsed between the previous Order of Dismissal and the Motion for New Trial, and in the alternative overruled it on its merits.

Three years after the dismissal in 1937 of the stockholders' suit in the State Court, a similar suit in which F. F. Dollert was intervener was filed in 1940 in Federal Court. In that suit Houston Oil Company of Texas and other defendants pleaded, among other defenses, the judgment of dismissal with prejudice as res judicata. F. F. Dollert, in the Federal suit, contended that such judgment was void on its face and therefore not res judicata, and that the contract which he sought to set aside was fraudulent and illegal. The Federal District Court after trial held that there was no evidence of fraud or illegality and that the Order of Dismissal with prejudice was not void and that the plea of res judicata should be sustained (F.T.R. 507 to 520). From this decision F. F. Dollert appealed to the United States Circuit Court of Appeals, Fifth Circuit, and on January 8, 1943, that court affirmed the Trial Court's judgment. (WERT T. REED AND F. F. DOLLERT v. HOUSTON OIL COMPANY OF TEXAS, ET AL., 132 Fed. (2d) 478.)

On May 3, 1943, the United States Supreme Court in WERT T. REED AND F. F. DOLLERT v. HOUSTON OIL COMPANY OF TEXAS, ET AL., denied F. F. Dollert's Petition for

Writ of Certiorari, No. 877, October Term, 1942 (87 L. Ed. 1699, 319 U.S. 743).

We believe that a simple chonological statement of the facts and procedure involved in these cases will be of aid and assistance to the Court in passing upon Petitioner's Petition for Writ of Certiorari and at the same time will be a complete answer and defense thereto and the best argument for denying said Petition.

(1) SEPTEMBER 28, 1925, an oil and gas joint operating contract was entered into by and between Pratt-Hewit Oil Corporation and Houston Oil Company of Texas (F.T.R. p. 889) (S.T.R. p. 22).

(2) SEPTEMBER 28, 1927, the suit of W. E. Hewit, et al., v. Pratt-Hewit Oil Corporation, et al., No. 795, District Court of Refugio County, Texas, was filed as a class or stockholders' suit by a stockholder of Pratt-Hewit, later joined by F. F. Dollert, now Petitioner, and other stockholders as intervenors, for the purpose of setting aside such contract for alleged fraud and alleged illegality. Arthur H. Bartelt, the attorney for the present Petitioner, represented some of the intervenors (F.T.R. pp. 174 and 186).

(3) SEPTEMBER 12, 1933, there was filed Consolidated Cause No. 1154, styled A. D. Rooke, et al., v. H. M. Allen and Houston Oil Company of Texas, et al., District Court, Refugio County, Texas. F. F. Dollert, present Petitioner, was a defendant in that case and was represented by Arthur H. Bartelt, his present attorney. That case involved incidentally the validity of the Joint Operating Contract (F.T.R. p. 175).

(4) JANUARY 26, 1937, a final judgment was entered in the suit of W. E. Hewit, et al., v. Pratt-Hewit Oil Corporation, et al., No. 795, District Court, Refugio County, Texas,

upon the Motion of Arthur H. Bartelt and other attorneys in which judgment it was provided that such cause of action was dismissed with prejudice and from which judgment no appeal of any kind was ever perfected (F.T.R. pp. 223-228).

(5) APRIL 11, 1938, a final judgment was entered in the above suit of A. D. Rooke, et al., v. H. M. Allen and Houston Oil Company of Texas, et al., approved by Arthur H. Bartelt, attorney for F. F. Dollert, and based on a settlement agreement approved by such attorney recognizing the validity of the Joint Operating Contract (F.T.R. p. 177).

(6) FEBRUARY 12, 1940, Arthur H. Bartelt, on behalf of Wert T. Reed, a stockholder of Pratt-Hewit, filed a suit in the United States District Court, Southern District of Texas, Victoria Division, styled Wert T. Reed v. Houston Oil Company of Texas, et al., No. 17, which was afterwards transferred to the Houston Division and given Number 422 in said division. This was a stockholders' and class suit involving the same Joint Operating Contract of September 28, 1925, and was practically identical to the above State Court suit filed September 28, 1927, styled W. E. Hewit v. Pratt-Hewit Oil Corporation, et al., and which had been dismissed *with* prejudice on January 27, 1936, on the motion of Arthur H. Bartelt and the other attorneys in such case (F.T.R. p. 310).

(7) AUGUST 20, 1940, Arthur H. Bartelt wrote a letter to the District Judge of Refugio County, Texas, and requested permission to withdraw certain papers in the State Court suit of W. E. Hewit, et al., v. Pratt-Hewit Oil Corporation, et al., which letter, among other things, stated:

"This case was dismissed by the Court with prejudice

January 28, 1937, upon request of all parties." (Amicus Curiae Exhibit 16) (S.T.R. p. 31).

(8) OCTOBER 26, 1940, F. F. Dollert filed in the Federal Court suit a petition for leave to intervene and he, through his attorney, Arthur H. Bartelt, alleged "whatever judgment is entered in this case this petitioner will be bound by" (F.T.R. p. 468).

(9) DECEMBER 4, 1940, F. F. Dollert, through his attorney, Arthur H. Bartelt, filed his intervention in said Federal Court suit and adopted the pleadings of the plaintiff, alleging that the Joint Operating Contract was fraudulent and illegal, and further that the Federal Court suit was not identical with the State Court suit which had already been finally disposed of by an order of dismissal with prejudice, and still further that such dismissal had been obtained by fraud in that Houston Oil Company of Texas had filed an answer which contained a General Denial and thereby "deliberately pleaded a falsehood when it denied 'each, all, and every one of the allegations in plaintiff's petition contained, says same are not true in whole or in part and of this it puts itself upon the country' " (F.T.R. p. 468).

(10) FEBRUARY 24, 1941, the Federal Court suit went to trial and F. F. Dollert was represented by Arthur H. Bartelt and such trial resulted in a judgment against F. F. Dollert (F.T.R. p. 504).

(11) MARCH 11, 1941, the Court entered a final judgment in the Federal Court suit which among other things recited, "Court is of the opinion that judgment should be entered against the intervener and in favor of the defendants on the merits; it is therefore Ordered, Adjudged and Decreed that Intervener, F. F. Dollert, take and recover

nothing of and from the defendants or either of them" (F. T.R. p. 504).

(12) APRIL 11, 1941, the Court in the Federal Court suit filed Findings of Fact and Conclusions of Law (F.T.R. pp. 507-520). Among other things the court found and held:

(a) "This contract was to the advantage of both the Pratt-Hewit Oil Corporation and the defendant, Houston Oil Company of Texas."

(b) "W. E. Hewit, for himself and all other stockholders, brought a suit in the District Court of Refugio County, Texas, in which he sought substantially the same relief that is sought in this case."

(c) "No evidence of fraud in procuring the dismissal of that lawsuit with prejudice has been brought before this Court. So far as the right of the intervener Dollert and the rights of the defendant Houston Oil Company of Texas and the Pratt-Hewit Oil Corporation are concerned, there was an absolute identity of parties and subject matter. The only distinction is that in the suit brought in the State District Court of Refugio County no specific evidences of fraud were pointed out in the petition in that case as have been attempted to be pointed out in the complaint in this case, but the charges of fraud and the charges of the purchase of the discretion of Thomas H. Pratt are, from a legal standpoint, the same. The charges that the contract is illegal and unjust and unlawful are the same."

(d) "There is no evidence of fraud, no credible evidence of fraud, before me on the part of either Thomas H. Pratt or W. E. Hewit."

(e) "Since the intervener, F. F. Dollert, was a party to the (State Court) suit involving the identical issue of fraud in procuring the contract of September 28, 1925, he is bound by the judgment of dismissal with prejudice entered in that cause in 1937 and cannot re-

cover here, and the defendants' plea of res adjudicata heretofore filed will at this time be sustained."

(f) "The Court is of the opinion that judgment should be entered against the intervener and in favor of the defendants on the merits."

(g) "Since both the plaintiff and the intervener knew of the pendency of the suit in the State District Court of Refugio County and knew of the general charges made in the various letters to the stockholders to the effect that the contract of September 28, 1925, was in fraud of the rights of the stockholders of the corporation, and since Dollert, the intervener, was a party to that suit, and since both intervener and plaintiff could have known, or could have learned of the existence of the very evidence now relied on by them to show fraud, they have been guilty of laches and of such delay in the bringing of this suit that they are not entitled to maintain it now."

(h) "The defendants, Pratt-Hewit Oil Corporation of Delaware and Texas, the Houston Oil Company of Texas, the Houston Pipe Line Company, Grace D. Pratt, and Christie Hewit are entitled to judgment that plaintiff and intervener take nothing by this suit."

(i) "There should be an end to litigation of this type, especially where there have been so many suits already involving this Company (Pratt-Hewit Oil Corporation), one of which was a shareholders' suit" (F.T.R. pp. 507-520).

(13) JANUARY 8, 1943, the United States Circuit Court of Appeals, Fifth Circuit, affirmed the decision of the trial court in the case of WERT T. REED v. HOUSTON OIL COMPANY OF TEXAS, ET AL., and among other things held:

"It is claimed by Appellants (Wert T. Reed and F. F. Dollert) that the contract and leases were procured by fraud, part of which consisted in bribing a corporate

officer. Many issues were presented and many defenses raised in the court below, but Appellees' real defense was that there was no fraud. No good could result either from restating the pleadings or reviewing the evidence in this case. The findings and conclusions of the District Court are free from error and the judgment appealed from is affirmed" (132 Fed. (2d) 748).

(14) MAY 3, 1943, the United States Supreme Court denied F. F. Dollert's petition for Writ of Certiorari, 87 L. Ed. 1699, 319 U.S. 743.

(15) JUNE 1, 1943, the United States Supreme Court overruled F. F. Dollert's Motion for Rehearing, 87 L. Ed. 1699.

(16) AUGUST 5, 1943, Houston Oil Company of Texas received from Arthur H. Bartelt, through the mail what purported to be a copy of Motion to set aside the State Court judgment entered January 26, 1937 (S.T.R. p. 1).

(17) OCTOBER 14, 1943, Suggestions by Amicus Curiae were filed in the District Court of Refugio County, Texas, calling Petitioner's attention to the fact that the Court was without jurisdiction on such motion and that if he were entitled to set aside such judgment of dismissal his remedy was by a separate suit of bill of review (S.T.R. p. 27 and 28).

(18) OCTOBER 18, 1943, the District Court of Refugio County, Texas, in a hearing on the Motion of F. F. Dollert to set aside the State Court judgment of January 26, 1937, entered an order reading in part as follows:

"that said motions be and they are hereby dismissed for lack of jurisdiction, and further, that if the court have jurisdiction over said motions, they are hereby denied and overruled for lack of merit" (S.T.R. p. 28).

(19) FEBRUARY 16, 1944, Petitioner's attorney in his oral

argument in the Court of Civil Appeals, San Antonio, Texas, stated that he did not file a bill of review because such action was barred by the lapse of time. He sought to get around the long lapse of time by trying to stay in the same suit and get relief therein by a new trial. The Court of Civil Appeals in its opinion stated:

> "Appellant's counsel upon oral argument of this appeal maintained that said motion was not intended as and for a bill of review. Counsel stated quite frankly that relief by way of bill of review was barred by lapse of time—the order of dismissal with prejudice having been rendered on January 26, 1937, while the motion here involved was filed on August 5, 1943" (S.T.R. p. 39, 179 S.W. (2d) 346).

(20) MARCH 8, 1944, the Court of Civil Appeals affirmed the judgment of the trial court (S.T.R. p. 39 and 179 S.W. (2d) 346).

(21) APRIL 5, 1944, the Court of Civil Appeals overruled Motion for Rehearing (S.T.R. p. 44).

(22) MAY 31, 1944, Supreme Court of Texas refused Application of F. F. Dollert for Writ of Error and in its order recited: " * * * the Court having determined that the judgment of the Court of Civil Appeals is correct, it is ordered that the application be refused for want of merit" (S.T.R. p. 48).

(23) SEPTEMBER 27, 1944, the Supreme Court of Texas overruled Motion for Rehearing (S.T.R. p. 48).

(24) JANUARY (?), 1945, Petitioner filed Petition for Writ of Certiorari with Clerk, United States Supreme Court.

REASONS WRIT OF CERTIORARI SHOULD NOT BE GRANTED

First

Because the decision of the State Court did not violate that provision of the Fourteenth Amendment of the United States Constitution reading: "No State shall make or enforce any law which shall abridge the 'privileges or immunities' of citizens of the United States," since the State had made no law and the Court enforced no law of the State which was an abridgment of privileges or immunities of citizens.

Second

Because the decision of the State Court did not violate that provision of the Fourteenth Amendment of the United States Constitution reading: "nor shall any State deprive any person of life, liberty or *property* without *due process of law*," since Petitioner's cause of action, the right to set aside a contract for alleged fraud and illegality, being a property right, had been dismissed with prejudice by agreement of all parties more than six years previously in a State Court and said identical cause of action had been adjudicated adversely to Petitioner more than three years previously in a Federal Court, and since the action of the Court of Civil Appeals merely affirmed an order of the trial court dismissing for want of jurisdiction a motion to set aside a judgment or motion for new trial untimely filed and more than six years too late, when Petitioner might have filed a timely motion and perfected an appeal or filed within four years, for good cause shown, a bill of review, showing a meritorious cause of action, under the State Court procedure.

Brief in Support of Reply

Petitioner in his petition has pointed out no law made by the State of Texas or enforced by the State Court which abridged "privileges or immunities" belonging to him as a citizen of the United States. The reason for such omission is obvious. There was no such law involved in his case.

The decision of the State Appellate Court deprived him of no property or property rights. Before he filed his belated Motion for New Trial he had already lost his alleged cause of action in the Federal Courts. As shown hereinabove, the Federal Trial Court held that his cause of action in State Court was identical with his cause of action in the Federal Court. He was denied a recovery by the Federal Courts. REED AND DOLLERT v. HOUSTON OIL COMPANY AND PRATT-HEWIT OIL CORP., 132 Fed. (2d) 478, 319 U.S. 743, 87 L. Ed. 1699.

The decision of the State Appellate Court not only did not deprive Petitioner of property, but afforded him due process of law. The decision of the State Appellate Court simply affirmed an order of the State Trial Court which dismissed his Motion for New Trial for lack of jurisdiction. Petitioner, eighteen years ago, selected as his forum for trying his alleged cause of action, the District Court of Refugio County, Texas. He filed his intervention in a suit there and was charged with notice of the action and proceedings taken therein. In 1937, eight years ago, that suit was dismissed and as the order of the court recites "plaintiff, interveners, and defendants all requested the Court to dismiss this suit." While that suit was pending for ten years, Petitioner had ample opportunity to be heard and ample opportunity to defend his position. The proceedings in the State Court were orderly and were adapted to the nature of the case. He had not only his day in Court, but in fact his years. He has had fair and impartial trials. If he were dissatisfied with the dis-

missal he took no timely steps to appeal nor to file a bill of review as he might have done within four years from discovering a wrong, if any. More than three years after such dismissal he elected to file a similar intervention in a Federal Court suit. Such intervention was filed after it became apparent that the plaintiff could not maintain that suit because he was not a stockholder at the time of the alleged wrong and because his stock had not devolved upon him by operation of law. Petitioner contended that he was entitled to file such intervention in the Federal Court suit in the face of the dismissal with prejudice in the State Court suit because he claimed to have discovered new evidence of the fraud which he had originally alleged. The Federal Courts rendered judgment against him. He then sought to file a motion to set aside the order of dismissal entered in the State Court suit more than six years before. The proper procedure would have been to file a Bill of Review, but this would have required him to allege and prove just cause for delay and also a meritorious cause of action. It would be useless and folly to grant him a new trial if he had no meritorious cause of action. He had none because the Federal Courts had adjudicated that against him. As shown by the decision of the State Appellate Court, he did not take the route of Bill of Review because he knew that was then barred by limitation.

The State Courts had no jurisdiction over the belated Motion for New Trial other than to dismiss it for lack of jurisdiction. At the time the stockholders' suit was dismissed with prejudice by the District Court of Refugio County, Texas, on January 26, 1937, REVISED CIVIL STATUTES OF 1925, Art. 2232, read as follows:

> "New trials may be granted and judgments arrested or set aside on motion for good cause, on such terms as the court shall direct. Each such motion shall:
>
> "1. Be made within two days after the rendition of

verdict if the term of court shall continue so long, if not, then before the end of the term, and may be amended under leave of the court.

"2. Be in writing and signed by the party or his attorney.

"3. Specify each ground on which it is founded, and no ground not specified shall be considered.

"4. Be determined at the term of the court at which it is made."

At the time Petitioner filed his Motion to set aside said judgment of dismissal and motion for new trial on August 5, 1943, such statutory provision with reference to motions to set aside judgments and for a new trial had been carried into the RULES OF CIVIL PROCEDURE for the State of Texas as Rule 320, such rule being practically identical with the statutory provision. See GREEN v. GREEN, 288 S.W. 406 (T.C.A. 1926); WINTERS MUTUAL AID ASSN. v. REDDIN, 49 S.W. (2d) 1095 (T.C.A. 1932).

Petitioner has cited many cases, but they are not applicable to the situation at hand and need no comment.

Petitioner has complained much about the contract which he sought to set aside. The contents of the contract are really not material to this particular proceeding. They have been dealt with in other proceedings and adversely to Petitioner's contentions. Petitioner's contentions that the contract was void, fraudulent, illegal, and violative of the Texas Anti-trust, Monopoly and Usury laws have been overruled in the State Court and Federal Court proceedings, and such contentions were fully developed by Petitioner in his previous Petition for Writ of Certiorari, which was denied by the Supreme Court of the United States in REED AND DOLLERT v. HOUSTON OIL COMPANY AND PRATT-HEWIT OIL CORPORATION, 132 Fed. (2d) 478, 319 U.S. 743, 87 L. Ed. 1699.

Petitioner has confused his rights, or lack of rights, in the over due motion for new trial with rights he might originally have had in the case if his allegations had been true, and they were not, before it was dismissed with prejudice at the request of all parties and before the Federal Courts held that he should take and recover nothing on his alleged cause of action.

We therefore submit in the words of the Federal Trial Court in his findings: "There should be an end to litigation of this type, especially where there have been so many suits already involving this Company (Pratt-Hewit Oil Corporation), one of which was a shareholders' suit."

WHEREFORE, this Respondent respectfully prays that the Writ of Certiorari prayed for herein be in all things denied and refused.

Respectfully submitted,

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